

82-6423

CASE NO. A-681

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

BERNARD BOLANDER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA
RESPONSE TO PETITION FOR WRIT OF CERTIORATI

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QUESTIONS PRESENTED FOR REVIEW

I

THE IMPOSITION OF DEATH SENTENCES FOLLOWING A JURY VERDICT RECOMMENDING LIFE SENTENCES DID NOT CONSTITUTE A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND A DEPRIVATION OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

II

THE AGGRAVATING CIRCUMSTANCES SET FORTH IN SECTIONS 921.141(5)(a) AND (g) FLORIDA STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.

III

THE DENIAL OF PETITIONER'S REQUEST TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS DID NOT VIOLATE PETITIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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PRELIMINARY STATEMENT

Respondent accepts the portion of the Petition for Writ of Certiorari setting forth the citation to the Opinion Below, Questions Presented, Constitutional Provisions and Statutes Involved, found on page 1-2 of the Petition. In accepting the Questions Presented, Respondent does not accept any assumption of law contained in the point as set forth.

JURISDICTION

Petitioner seeks to invoke jurisdiction pursuant to 28 U.S.C. §1257(3), to review the judgment and opinion of the

Supreme Court of Florida, issued on October 28, 1982 and rendered upon the denial of a timely motion for rehearing on December 20, 1982. Respondent would submit that this Court should not invoke jurisdiction in that Petitioner has failed to demonstrate grounds upon which the jurisdiction of this Court might be invoked.

STATEMENT OF THE CASE

Respondent would direct this Court's attention to the opinion rendered in Bolander v. State, 422 So.2d 833, 834, 835 (Fla. 1982) wherein the Florida Supreme Court in a detailed rendition presented the germane facts applicable to resolution of the issues raised.

REASONS FOR NOT GRANTING THE WRIT

I

THE IMPOSITION OF DEATH SENTENCES FOLLOWING THE JURY'S RECOMMENDATION THAT LIFE SENTENCES BE IMPOSED DOES NOT CONSTITUTE A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND A DEPRIVATION OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

Petitioner asserts that the imposition of the death sentences following the advisory jury recommendation against death violates both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment in that: (1) "Florida Law permits no degree of finality to a jury's advisory verdict"; (2) "It allows trial judges to override such advisory verdicts utterly ungoverned by any meaningful standards"; (3) "By denying any finality to a jury advisory verdict, Florida Law Countenances a practice which it specifically bars in civil trial practice." relying primarily on

this Court's recent decision in *Bullington v. Missouri*, 451 U.S. 430 (1981). Petitioner argues that Florida's law is flawed in that it affords no degree of finality to the jury's penalty verdict.

Respondent would submit that the issue is not properly before the court and pursuant to *Cardinale v. Louisiana*, 394 U.S. 437 (1969), relief on this ground should be denied. As observed in *Cardinale, supra*, ". . . It was very early established that the court will not decide Federal Constitutional Issue raised here for the first time on review of State court decisions. In *Crowell v. Randell*, (cite omitted), Justice Storey reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, (cite omitted), and came to the conclusion that the Judiciary Act of 1789, Chapter 20, Section 25, 1 Stat. 85, vest this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the Appellate Jurisdiction fails." (cite omitted). "The court has consistently refused to decide federal constitutional issue raised here for the first time on review of state court decisions. . . ." 394 U.S. at 438.

In the instant case a review of the claims raised before the Florida Supreme Court reflects that Petitioner never challenged the propriety of the jury override in terms of Due Process and Equal Protection under the Fourteenth Amendment. In fact the opinion reflects that Petitioner contended that the "jury's recommendation was reasonable because the victims were armed cocaine dealers who may have been planning to rob the defendant, because Macker received a comparatively light sentence, and because Macker testified as to who shot, stabbed, and killed the victims." 422 So.2d at 837.

Clearly said claim has been raised for the first time in Petitioner' Petition for Writ of Certiorari.

II

THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECTIONS 921.141(5)(e) AND (g) FLORIDA STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.

Petitioner's second point on appeal suffers the same infirmity as his first, that is, that said claim challenging the vagueness of Section 921.141(5)(e) and (g) Florida Statutes has been raised for the first time in the instant petition. Pursuant to Cardinale v. Louisiana, supra, said claim is not properly before the court.

While Petitioner argued on direct appeal that the aforementioned circumstances were not supported by evidence and proven beyond a reasonable doubt, Petitioner did not argue that said statutory aggravating circumstances were so vague as to deny Petitioner's his constitutional right to defend against said circumstances.

III

THE DENIAL OF PETITIONER'S REQUEST TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS DID NOT VIOLATE PETITIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's last point raises the only claim which was specifically argued to the Florida Supreme Court on direct appeal. The court in reviewing this issue concluded:

"Given these facts we find no abuse of discretion by the trial court in denying the Writ of Habeas Corpus ad testificandum. Bolander was no notice from the April 8th hearing that his original subpoena may have been defective, yet he failed to correct the improper service or file for the writ prior to trial. By waiting until the State had rested before seeking the writ, Bolander improperly sought to disrupt and delay the proceedings, and the court properly denied his motion."

Bolander v. State,
422 So.2d at 836.

The record as set out by the Florida Supreme Court in its opinion reflects that Petitioner was first of all not entitled to a Writ of Habeas Corpus ad testificandum in that under Florida Law there is some question as to whether the trial court had authority to issue said writ, See State ex rel. Deeb v. Fabisinski, 152 So. 207 (1933), in that Florida Statutes Section 914.001 provides that witness subpoenas in criminal cases shall run throughout the state and Florida Statutes Section 48.051 specifically allows for service of process on State's prisoners. A defendant who seeks to have a State prisoner testify on his behalf can simply subpoena that prisoner.

Although it appears that Appellant did attempt to serve the witness with a subpoena, said witness had been previously adjudged incompetent and had not been found to have regained his competency. Under such circumstances, it was necessary to serve a witness' guardian, Florida Statutes 48.041. This was not done in the instant case. Petitioner's effort to utilize the subpoena process was ineffective in this case because he made no further effort to subpoena a witness' guardian but rather waited "until the State had rested before seeking the writ", in attempt to disrupt and delay the proceeding. 422 So.2d at 836. See Whitefield v. State, 188 So. 361 (1939).

Respondent would submit Petitioner has failed to demonstrate that the actions of the trial court in denying Petitioner's Writ of Habeas Corpus ad testificandum equates to a denial of compulsory process to call witnesses under the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the numerous reasons cited above, Respondent would respectfully submit that the Petition for Writ of Certiorari filed in this Court be DENIED.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to GERALD D. HUBBART, Attorney for the Petitioner, 1481 N.W. North River Drive, Miami, Florida 33125, on this ____ day of April, 1983.

CAROLYN M. SNURKOWSKI
Assistant Attorney General